

Venkareddy Chennareddy v. U.S. General Accounting Office

Docket No.: 70-701-17-85

Date of Decision: April 7, 1988

Cite as: Chennareddy v. GAO (4/7/88)

Before: James, Chair

Standard of Review

ORDER

Background

This matter is before the Board on Petitioner's objection to our decision of January 4, 1988, denying Petitioner's motion to reopen and reconsider the decision of the Presiding Member in this case. The Presiding Member's decision, dated August 20, 1987, concluded that Petitioner's non-selection for five promotions to GS-14 was not the result of discrimination by the Respondent. Petitioner contends that our decision denying his appeal was erroneous because it was based on evidence which was not a part of the record below in this case. Petitioner requests that, in the interest of justice, we review our decision of January 4. We have granted Petitioner's request and re-examined our decision to deny Petitioner's motion to reopen and reconsider. In revisiting that decision, we have also re-read the record before us on appeal, and we find nothing to persuade us that our January 4 decision should be disturbed.

Petitioner filed his motion to reopen and reconsider on September 22, 1987. Petitioner contended that the Presiding Member's finding that Petitioner had not been discriminated against was arbitrary, capricious, an abuse of discretion and otherwise not consistent with law. Petitioner also contended that the Presiding member's decision was not supported by substantial evidence.

Petitioner's initial argument in his motion for reconsideration was that the Presiding Member committed prejudicial error when he denied Petitioner's prehearing request to require Respondent to file a formal response to his petition for review. Petitioner argued that the Presiding Member's denial of this request allowed Respondent to articulate a new reason for Petitioner's non-selections, and thus deprived Petitioner of a full and fair opportunity to show that the articulated explanations were pretextual. Petitioner contended that for the Presiding Member to deny the motion for clarification and then to permit Respondent to present evidence during the evidentiary hearing of a different defense than that proffered in the final agency decision was arbitrary, capricious, an abuse of discretion, and not consistent with the law governing employment discrimination cases.

Respondent filed its opposition to Petitioner's motion to reopen and reconsider on October 13, 1987. In its brief, Respondent contended that it had made all the response necessary to the petition for review, and that further, Petitioner had had ample opportunity to develop his case in full and discover the Agency's position through both the PAB General Counsel's initial investigation of the Petitioner's charge, and through subsequent prehearing discovery. Respondent argued that Petitioner had served each selecting

official with interrogatories and had also deposed each of them to ascertain exactly why each official had not selected the Petitioner for the position in question. In support of this argument, Respondent appended excerpts from the interrogatories and depositions conducted by Petitioner wherein the Agency officials, in response to Petitioner's questions, stated their exact reasons for preferring other candidates over Petitioner.

In our January 4, 1988, decision denying Petitioner's motion to reopen and reconsider, we agreed that Petitioner had been given ample opportunity to discover the Respondent's position and that the Presiding Member had committed no error in denying Petitioner's motion for a definite response to the petition for review. In our ruling we cited the evidence of the depositions as support for our decision.

On February 2, 1988, Petitioner filed his objection to the basis of our decision, arguing that the interrogatories and depositions appended to Respondent's brief were never submitted into evidence at the hearing before the Presiding Member and, therefore, it was error for the Board to have considered them on appeal.

Analysis

The general rule is that a reviewing body cannot act on any evidence that was not before the trial court, nor receive any document or evidence that was not part of the hearing record. Coplin v. United States, 761 F.2d 688, 691 (Fed. Cir. 1985), affirmed sub nom. O'Connor v. United States, 107 S. Ct. 347 (1986). Parties on appeal may rely only on those materials furnished to the trial examiner, and may not append materials to their briefs that were not before the trial court. Henn v. National Geographic Society, 819 F.2d 824 (7th Cir. 1987). Efforts to supplement the record by attachments to a party's briefs are improper. Rebuck v. Vogel, 713 F.2d 484 (8th Cir. 1983). Thus, even if Petitioner's depositions and interrogatories had been brought to the attention of the Presiding Member through briefs and oral argument, we could not consider them unless they were actually made part of the record. In re Arthur Andersen & Co., 621 F.2d 37, 39-40 (1st Cir. 1980). However, appellate bodies do have the authority to supplement the record or take notice of evidence necessary to come to an equitable resolution of the controversy. GHR Energy Corp. v. Crispin Company, Ltd., 791 F.2d 1200, 1202 (5th Cir. 1986); Karmen v. Commissioner of Internal Revenue, 749 F.2d 567, 570 (9th Cir.), cert. denied, 106 S. Ct. 66 (1984); Dickerson v. Alabama, 667 F.2d 1364, 1367 (11th Cir.), cert. denied, 459 U.S. 878 (1982). See also, Salinger v. Random House, Inc., 818 F.2d 252, 253 (2nd Cir. 1987). Moreover, if the record before us was inaccurate at the time we were deliberating Petitioner's motion to reopen and reconsider, it was Petitioner's responsibility to bring such fact to our attention. It is well settled that the party bringing the appeal has the responsibility to insure that the record before the appellate tribunal is accurate. GHR Energy Corp. v. Crispin Company Ltd., supra. The improper evidence was before the Board for almost three months before we issued our ruling, and although Petitioner was served with a copy of the Respondent's brief and appended discovery materials at the same time the Board was served (October 13, 1987), Petitioner did not call the error to the Board's attention, nor request in any manner that the improper materials be struck from Respondent's pleadings. Thus, Petitioner's failure to object to Respondent's pleadings in a timely manner waived his right to now so object. Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982); Order of Railway Conductors v. Clinchfield Railroad Co., 407 F.2d 985, 988 (6th Cir.), cert. denied, 396 U.S. 841 (1969). The Merit Systems Protection Board has also ruled that failure to timely object waives a party's right to later object to the basis of a ruling. Brown v. Department of Navy, 21 M.S.P.R. 204, 84 F.M.S.R. 5465 (1984).

Petitioner's having waived his right to object to Respondent's pleadings renders the Board's action, in our view, harmless error at most. See, Marshall v. City of Cape Coral, Fla., 797 F.2d 1555 (11th Cir. 1986). An error is considered harmless if it does not injuriously affect the substantive rights of the complaining party as regards the outcome of the decision. See, e.g., Eastburn v. Ford Motor Co., 471 F.2d 21, 23 (5th Cir. 1972), cited in Bass v. United States Department of Agriculture, 737 F.2d 1408, 1414 (5th Cir. 1984). Clearly, the denial of Petitioner's prehearing motion stands independent from the fact that Petitioner had an opportunity to discover the Respondent's case prior to hearing, and that is all our rules, and fundamental fairness, require. Although we mentioned the depositions in our January 4 ruling, our holding was premised, not on what Petitioner's discovery revealed, but on the fact that Petitioner did, indeed, have an opportunity to discover Respondent's case. Having had the opportunity to discover the case, Petitioner cannot now argue that the Presiding Member's denial of Petitioner's prehearing motion is what kept him from ascertaining the Respondent's defense.

Petitioner does not take issue with our review of the merits of the Presiding Member's decision, so we need not address the remaining portions of our decision denying the Petitioner's motion to reopen and reconsider. Petitioner's objection to the basis of our decision is overruled.